

APPENDIX A

Part 1 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

Part 1--PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 503(b)(5); 5 U.S.C. 552; 21 U.S.C. 853a.

2. Section 1.80 is revised by adding a note after paragraph (b)(4) to read as follows:

§1.80 Forfeiture proceedings.

* * * * *

(b) * * *

(4) * * *

Note: GUIDELINES FOR ASSESSING FCC FORFEITURES FOR EEO VIOLATIONS

Failure to recruit for at least 66% of all vacancies during the period under review so as to attract an adequate pool of minority and female applicants. Efforts are evaluated both for the station's staff overall and for upper-four job categories. (Evidence of this violation will include (1) inadequate record-keeping and/or (2) inadequate self-assessment throughout the period under review.)

\$12,500 base forfeiture
(accompanied by reporting conditions)

Upward Adjustment Criteria

I. Egregious Misconduct

- A. Failure to recruit for at least 33% of all vacancies reported for the period under review so as to attract an adequate pool of minority and female applicants. Efforts are evaluated both for the station's staff overall and for upper-four job categories. \$ 6,250 upward adjustment

(EEO programs achieving only this level of compliance will warrant a short-term renewal, irrespective of whether other upward adjustments for "egregiousness" factors are present, if the percentage of vacancies for which the licensee failed to recruit, as described in I(A), falls below 33% and other factors—e.g., use and productivity of recruiting sources, use and productivity of minority-specific source; evidence of self-assessment— are absent or particularly inadequate)

- B. Large or substantial number of hiring opportunities that did not translate into an adequate pool of minority and female applicants.

- "Large number" means hiring opportunities equal to at least the average number of employees on the full-time staff, with a minimum of 25 hiring opportunities \$ 6,250 upward adjustment (Base plus 50%)
- "Substantial number" means hiring opportunities equal to three times the number of full-time staff, with a minimum of 25 hiring opportunities Additional upward adjustment of 50-90% of base

- C. Large pool of minorities in the relevant labor force did not translate into an adequate pool of minority applicants.

Analysis will focus on (1) the overall percentage of minorities in the relevant labor force and (2) the presence of a minority group constituting a significant percentage of that labor force.

- If a licensee has a relevant labor pool of at least 20 percent minorities or a \$ 6,250 to \$11,250 upward adjustment (base plus 50-90%)

single minority group constitutes at least 10 percent of the labor force

Short term renewals: Short term renewals will be assessed if (A), (B) or (C) are applied in any combination of two or more upward adjustments. In addition, short term renewals also will be warranted where the specific criteria set forth in (A) above are present. The presence of the mitigating factors described in Section II below are grounds for not issuing short term renewals.

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| D. Prior EEO violations that resulted in previous sanction or remedy | <ul style="list-style-type: none">- If reporting conditions were previously imposed, the licensee receives reporting conditions and the base forfeiture plus a 90% upward adjustment in addition to any other upward adjustments warranted by these guidelines (including short-term renewal)- If reporting conditions plus a forfeiture were previously imposed, the licensee receives reporting conditions, the base forfeiture plus a 90% upward adjustment, any other upward adjustments warranted by these guidelines, and a short-term renewal- If previous sanction and remedies included a short-term renewal, the renewal will be designated for hearing and possible forfeiture of \$250,000 |
| E. EEO violations with respect to both minorities and women | \$11,250 upward adjustment and a short-term renewal |

Downward Adjustment Criteria

II. Few Hiring Opportunities

- | | |
|---|------------------------------|
| A. 5 or fewer hiring opportunities during | \$ 6,250 downward adjustment |
|---|------------------------------|

period under review	
B. 10 or fewer hiring opportunities during the period under review if the average full-time staff during the entire term exceeds 50 employees	\$ 6,250 downward adjustment (Either (A) or (B) will apply, but not both)
III. Low Percentage of Minorities in Relevant Labor Force	
Minorities constitute less than 6% of the relevant labor force	\$ 6,250 downward adjustment and possible non-issuance of short-term renewal depending upon staff balancing of factors (number and productivity of sources contacted, number and productivity of minority-specific sources, extent to which licensee demonstrated severe shortfall in recruitment)
IV. Inability to Pay (if raised and demonstrated by the licensee)	Varies
V. Stand-alone station in markets ranked 200 and above as reflected in the annual Arbitron or Nielsen population rankings.	\$ 6,250 downward adjustment

APPENDIX B

Initial Regulatory Flexibility Act Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. **Reason for Action:** This proposed rule making is designed to solicit comments regarding the Commission's efforts to amend our EEO Rule to ensure its effectiveness while affording relief to licensees and permittees of small stations and other distinctly situated broadcasters, and, generally, streamlining the operation of the EEO Rule for all broadcasters. This proposed rule making is also designed to solicit comments regarding the Commission's proposed adoption of forfeiture guidelines fashioned after those articulated in the EEO Policy Statement, 9 FCC Rcd 929 (1994). That decision was patterned after Policy Statement, Standards for Assessing Forfeitures, 8 FCC Rcd 6215 (1993), which was vacated by the United States Court of Appeals for the District of Columbia Circuit in United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994).

II. **Objectives:** The Commission is seeking information regarding the impact of its EEO Rule on broadcasters of small stations and other distinctly situated broadcasters, the paperwork burden of all broadcasters in their attempt to comply with our rules and policies regarding equal employment opportunity, and the guidelines to be used in implementing its authority to issue increased monetary forfeiture penalties for EEO violations,

III. **Legal Basis:** The proposed action is authorized under the authority contained in Sections 4(i), 303(r), and 503(b) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303(r), 503(b).

IV. **Reporting, Recordkeeping and Other Compliance Requirements:** None.

V. **Federal Rules Which Overlap, Duplicate or Conflict With These Rules:** None.

VI. **Description, Potential Impact, and Number of Small Entities Involved:** Adoption of these forfeiture guidelines, as well as other proposals set forth in this Order and NPRM, could affect all licensees, including those that qualify as small business entities.

VII. **Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:** In this item, we solicit comment on proposals to amend the EEO Rule to maintain the Rule's viability while reducing the paperwork required of broadcasters of small stations and other distinctly situated broadcasters. The item also solicits comments on better ways to accomplish the goals of developing guidelines for determining forfeiture amounts and providing notice to the public about the range of forfeiture amounts that may be assessed for EEO violations. We are unable to assess at this

time what, if any, economic impact the proposed rule change would have on small business entities. A full assessment of the potential economic impact, as required by Section 605(b) of the Regulatory Flexibility Act of 1980 [Pub. L. 96-354, 5 U.S.C. § 605(b)] will be made, if applicable, at the final rulemaking stage.

APPENDIX C

Format for Inquiry Response

(1) News Director; Officials and Managers; Full-time

3 Applicants: 1 White female A.W.R.T. (Inter)

1 Black male Urban League (Inter)

1 Black female NAACP

Sources Contacted (number, race and gender of referrals received) : Local

Newspaper (3WM, 2WF), A.W.R.T. (3WF), Urban League (2BM), and NAACP
(2BF)

Selected: Black male (03/15/96), Urban League

Note: Inter = Interviewee

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Streamlining the Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules To Include EEO Forfeiture Guidelines.

Today the Commission initiates a Notice of Proposed Rule Making ("Notice") in an effort to streamline its equal employment opportunity (EEO) requirements without diminishing the effectiveness of its EEO rules. In addition, the Notice proposes guidelines for imposing forfeitures on broadcast licensees for EEO violations.¹

I write separately to emphasize the importance of the Commission's existing EEO requirements and to express my concerns with regard to any further relaxation or diminution of these rules. While I recognize that most broadcasters have not violated the Commission's EEO rules, the Commission's employment statistics for broadcast stations evidence only a minimal increase in the number of minority employees at broadcast stations, despite what some have considered the Commission's "aggressive" EEO provisions.² Indeed, I have attended many broadcast conventions and conferences and the dearth of minorities and women, particularly among the management ranks, cannot and should not be ignored. Therefore, it is critical that the Commission carefully balance its desire to reduce any alleged administrative burdens for "small" stations with the need to urge fundamental fairness in the stations' recruitment process.

Indeed, some have focused their criticism of the Commission's EEO rules on the alleged undue administrative burden on licensees, particularly "small" station licensees. However, I

¹I note that the Commission is not seeking comment in this proceeding on EEO rules for cable television or common carrier providers. Nevertheless, I urge the Commission to review its EEO obligations for these services in the near term. As these industry players merge and converge, it is essential that the Commission also clarify and strengthen its commitment and policies for these services.

²See In the Matter of Implementation of Commission's Equal Employment Opportunity Rules, MM Docket No. 94-34, 9 FCC Rcd 6276, 6307 (EEO Report) (showing that from 1986-1993 there was only a net increase of 2.2% minorities in the broadcast industry).

am not convinced that this burden is necessarily "undue". Stations, be they "large" or "small", must fill vacancies as they arise. Presumably, some form of recruitment is necessary. Additionally, as we are aware, every licensee has other administrative and paperwork obligations to demonstrate compliance with other Commission regulations.³

We cannot underestimate the importance of "small" stations for minority and female applicants' initial entry into the communications industry. Though some station owners argue that they are unable to attract or retain minorities and women because of higher salaries and opportunities offered by their larger competitors, I would argue that applicants, no matter their sex, race or ethnicity, often turn to smaller stations to acquire experience that they need to compete for employment at larger stations. Yet, all too often, I hear from those who have diligently sought employment at broadcast stations, only to be told that they lack the requisite experience. This highlights the "Catch 22" that many minorities and women face when seeking employment with broadcast stations.

Bear in mind, that the Commission's EEO provisions are efforts-based and focus primarily on a licensee's recruitment of minorities and women. The measures are not designed to hinge on the imposition of hiring requirements, and thus, should, in my opinion, meet any strict scrutiny standard of review under Adarand Constructors, Inc. v. Pena.⁴ As the Commission seeks to refine its EEO requirements, I will not support the implementation of a quota-like standard that seeks to alleviate a licensee's obligation to recruit minorities and women in the event that it consistently meets a specific employment profile. Such a measure would simply amount to a quota, which would severely undermine the efforts-based nature of the Commission's EEO rules. I also believe that such an approach could also increase the risk of judicial challenge. More importantly, I am concerned that such a measure would not give licensees the incentive to recruit or hire minority and female employees beyond the established targeted number.

I also write to emphasize the importance of the proposed guidelines that the Commission puts out for comment today. Once adopted, these guidelines should provide a level of certainty in the Commission's EEO review process and should obviate the need for the Commission to determine cases on an arbitrary ad hoc basis based on case precedent. I am particularly interested in reviewing comments regarding the amount of forfeitures that should be imposed for EEO violations. Interestingly, the

³See eq. 47 C.F.R. §73.3526.

⁴115 S. Ct. 2097 (1995).

Commission has recently imposed forfeitures in the tens of thousands of dollars against licensees who violate the Commission's commercial limitation rules in children's programming.⁵ The forfeitures for repeated EEO violations are by comparison, exceedingly low.⁶ Therefore, I am convinced that the Commission sends a clear message to the minority and female communities about the importance of its EEO rules.

I trust that parties will take this opportunity to provide the Commission with empirical data on the proposals that are set forth in the Notice. I view this opportunity as a means of enhancing and not debilitating the Commission's existing EEO rules. Whatever course of action the Commission ultimately takes with respect to its EEO rules, I hope that licensees will take steps necessary to continuously and aggressively seek out qualified minority and female applicants throughout their license terms. To do otherwise, would not only violate principles of fundamental fairness, but would also ignore the business benefits associated with developing a diverse workforce. In the end, it is this diversity that leads to the understanding, recognition and airing of varied viewpoints by broadcasters that the Commission seeks to ensure through the implementation of its regulations.

⁵See eg. Stainless Broadcasting Company, 10 FCC Rcd 9961 (1995) (where the Commission imposed a forfeiture in the amount of one hundred ten thousand dollars (\$110,000); UTV of San Francisco, Inc., 10 FCC Rcd 10986 (1995) (where the Commission imposed a forfeiture in the amount of forty thousand dollars (\$40,000)).

⁶Note that the Commission's EEO rules are not new. Broadcast licensees have been subject to these rules for almost thirty years. On the other hand, television licensees have only recently been subject to the 1990 Children's Television Act.

February 8, 1996

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

RE: *Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines*

Television and radio broadcasting is available to each of us free of charge, whether we are white or black, male or female, rich or poor, urbanite or rural dweller. Broadcasters serve a vital role in our society by providing the means by which we engage in public debate on a wide range of ideas and issues, including political and social issues of great import. For me, it has been and remains critical that broadcasters present a wide range of ideas from which public opinion can be distilled.

The Commission's equal employment opportunity (EEO) rules are intended to promote dissemination of the full range of views and information by ensuring that the employees of a station themselves reflect the diversity of the community they serve. I fully support our goal of equal employment opportunity. Discrimination cannot be tolerated in any form, substance, or manner, whether overt or covert.

By recruiting and hiring minorities and women in key positions, broadcasters stay in tune with their community's needs and listeners. I also know that employment experience is a critical factor for moving into station ownership.

It is precisely because of my strong support for equal employment opportunity that I want to revise our current rules and policies which are at once both over-regulatory and inadequately effective. Notwithstanding the best of intentions, the rules have had unintended consequences. They are complex in places, they do not give clear guidance, and particularly for smaller stations they can produce overly-harsh outcomes. To some extent, they exalt form over substance because the paperwork can be manipulated to pass muster even in the absence of sincere employment outreach efforts. They also are counterproductive to the extent that they burden broadcasters with paperwork requirements that do not further the laudable, underlying goal of equal opportunity and, worse, lessen broadcasters' support for equal employment opportunity.

So I hope all of us -- broadcasters, the public, and the Commission -- will use this proceeding to consider whether there are more effective and less regulatory ways to attain our equal employment opportunity objectives. Our Notice asks for comment on a variety of ideas, but I am especially interested in comments addressing four proposals that I believe may advance our goals:

- Relieving additional small broadcasters from the paperwork associated with our rules, but not from the EEO requirements themselves, would be a big step in the right direction.

- We also must identify clearer and better ways of spelling out our forfeiture guidelines so that they are readily understood, in addition to seeking comment on the substance of the guidelines themselves.

- Crediting participation at job fairs and job banks expressly designed to attract minority and female applicants would lessen the paperwork for many applicants and be more effective at attracting qualified candidates.

- Finally, a broadcaster's demonstrated long-term success in hiring women and minorities could obviate the need to document a licensee's efforts to recruit applicants. Absent evidence of discrimination, broadcasters that consistently have employed a staff that is reflective of their community should be found in compliance with our rules; they should not be subject to forfeitures merely for lacking records that document the efforts which led to the successful results. Our goal is equal opportunity, not pretty files. For those that do not demonstrate such an employment record, documentation is necessary and appropriate to demonstrate the efforts that were made to fulfill a commitment to strive for equal employment.

It is not a simple task to draft rules that provide strong incentives for equal employment opportunity and fair evaluation of licensees' efforts while minimizing complexity and paperwork. Nevertheless, I believe that we are up to the challenge.